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Shield, Sword, Or Trojan Horse? Free Speech as the Court's Modern Weapon of Choice

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I. INTRODUCTION

In late November 2018, President Trump criticized District Judge Jon S. Tigar of the United States Court of Appeals for the Ninth Circuit,[1] over the Obama-appointed judge's ruling that fed-

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1. Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent'*, WASH. POST (Nov. 21, 2018, 6:21 PM), https://www.wash-

eral law clearly mandates that migrants may seek asylum anywhere on United States soil.[2] This ruling was in direct opposition to the Trump Administration's attempt to deny asylum to migrants who illegally crossed the border.[3] However, the President's statements were not left unanswered. In a rare rebuke, Chief Justice John Roberts of the United States Supreme Court, appointed by President George W. Bush, departed from the stoic tradition of the Court, and responded to the President's statements.[4] The Chief Justice defended Tigar and the judiciary as a whole, stating:

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . That independent judiciary is something we should all be thankful for.[5]

The President quickly responded via Twitter: "Sorry Chief Justice Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country."[6] Regardless of which side of the aisle one stands on, there seems to be some truth behind both opinions.[7] The women and men who don the black robes in front of hundreds of court rooms across the United States every day are extraordinary individuals out to do their very best to interpret and apply the law how each see fit. Nonetheless, most still agree with the President's criticism that, truly, there are "Obama judges," that is, judges who

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ingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html?noredirect=on&utm_term=.7ddba56a041d.

2. *Id.*

3. *Id.* The district court judge wrote that, "[w]hatever the scope of the President's authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden." *Id.*

4. *Id.*

5. *Id.*

6. *Id.* The President continued:

> It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is why . . . are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security—these rulings are making our country unsafe! Very dangerous and unwise!

Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), https://twitter.com/realDonaldTrump/status/1065346909362143232; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 1:09 PM), https://twitter.com/realDonaldTrump/status/1065351478347530241.

7. *See generally* Jake J. Smith, *Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote*, KELLOGGINSIGHT (Sept. 13, 2018), https://insight.kellogg.northwestern.edu/article/supreme-court-justices-become-less-impartial-and-more-ideological-when-casting-the-swing-vote.

are partisan and aligned with the ideological principles of the President who appointed them.[8] Recently, this seemingly obvious criticism has intensified in the First Amendment realm.

The liberal-conservative divide has a long history in First Amendment jurisprudence. Initially, the Left[9] "embraced a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[10] This view aimed to broaden the First Amendment's protections in order to promote the right of dissenting speech for everyone.[11] On the other hand, the Right sought to apply free speech protections narrowly, believing it should only protect speech that is explicitly political.[12] This view changed over time as "conservatives recognized the importance from their perspective of affording strong free speech rights to business interests."[13]

This changing understanding of free speech has manifested in the decisions of the judiciary. In fact, the conservative majority on the Court "has narrowed [First Amendment] liberties except when it

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8. *See id.*

9. This article's reference to the "Left" refers to the left-wing ideologies centered around individuals with liberal beliefs, favoring an expanded role in government. Conversely, the "Right" refers to the right-wing ideologies centered around individuals with conservative beliefs, favoring individual rights and civil liberties.

10. STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 5 (2016) (citation omitted).

11. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

12. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html; *see, e.g.*, Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986) ("[W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact . . . ."))); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 783-84 (1975) (Rehnquist, J., dissenting) ("The Court speaks of the importance in a 'predominantly free enterprise economy' of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.") (citations omitted).

13. SHIFFRIN, *supra* note 10, at 6.

serves the conservative ideological agenda to do otherwise."[14] Ultimately, over the past decade the conservative majority has used the First Amendment as a weapon—an outcome-oriented tool—used to achieve certain ideological agendas.[15]

The United States Supreme Court's recent decision of *Janus v. AFSCME, Council 31*,[16] for example, has emphasized this issue. In *Janus*, the Court overruled *Abood v. Detroit Board of Education*, an over forty-year-old precedent, holding, in a five to four decision, that union "fair-share" fees are unconstitutional on First Amendment grounds.[17] This decision comes at the end of a lengthy campaign—backed by wealthy conservative legal foundations[18]—to reverse *Abood*,[19] and has been widely criticized as an ideological attack on labor unions.[20] The four-member dissent, authored by Justice Elena Kagan and joined by the Court's three remaining liberal members, criticized the five-member majority opinion, authored by Justice Samuel Alito and joined by the Court's four remaining conservative members, stating that the conservative majority effectively "weaponize[ed] the First Amendment."[21]

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14. ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 194 (2010); *see, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2491 (2018) (Kagan, J., dissenting) ("Indeed, [the majority's] reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech."); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting) ("[R]ather than set forth broad, new, First Amendment principles, [as the majority does,] I believe that we should focus more directly upon precedent more closely related to the case at hand."); Citizens United v. FEC, 558 U.S. 310 (2010) (expanding the free speech rights of corporations); Garcetti v. Ceballos, 547 U.S. 410 (2006) (denying free speech rights to public sector employees).

15. This article takes a more expansive view than what has been termed "First Amendment Lochnerism," i.e., "using the First Amendment as a workaround to bring back *Lochner*'s economic deregulation," focusing on the broader argument that the First Amendment has become a political tool. Boyd Garriott, Janus *and the Problem with Alleging Lochnerism*, ONLABOR (May 4, 2018), https://onlabor.org/janus-and-the-problem-with-alleging-lochnerism/; *see also* Kenneth D. Katkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non- Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006) (explaining briefly First Amendment Lochnerism).

16. 138 S. Ct. 2448 (2018).

17. *Id.* at 2486.

18. Celine McNicholas et al., Janus *and Fair Share Fees: The Organizations Financing the Attack on Unions' Ability to Represent Workers*, ECON. POL'Y INST. (Feb. 21, 2018), https://www.epi.org/publication/janus-and-fair-share-fees-the-organizations-financing-the-attack-on-unions-ability-to-represent-workers/.

19. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) (citing Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015); Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298 (2012)).

20. *See generally* Fran Spielman et al., *Chicago Teachers Union Uses* Janus *Case to Blast* Rauner, Emanuel, CHI. SUN TIMES (June 7, 2018, 10:36 AM), https://chicago.suntimes.com/news/chicago-teachers-union-uses-janus-case-to-blast-rauner-emanuel/.

21. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

This article analyzes the conservative majority's recent trend to exploit free speech as an outcome-oriented tool to promote certain ideologies. It utilizes the Court's decision in *Janus* to evidence this "weaponization" of the First Amendment and shed light on exactly what Justice Kagan condemns in her dissenting opinion. Finally, the article concludes by analyzing the potential implication of the conservative majority's weaponization of free speech, discussing potential challenges to state minimum wage laws.

II. BACKGROUND

A. *Historical Background of the Conservative Free Speech Movement*

1. *Early Years of Conservative Free Speech Ideology*

Since *Roe v. Wade*,[22] "the Supreme Court has rarely recognized new constitutional rights or extended existing rights; in fact, it often has significantly cut back on important civil liberties."[23] The Burger,[24] Rehnquist,[25] and Roberts[26] Courts generally have recognized new rights only when such rights advance conservative ideology.[27] This general trend persists in the context of the First Amendment.[28] Case law throughout the years since Chief Justice Warren[29]

22. 410 U.S. 113 (1973).

23. CHEMERINSKY, *supra* note 14, at 169.

24. In 1969, President Richard Nixon appointed Warren E. Burger as the Chief Justice of the United States Supreme Court due to his "starkly conservative stance" on Fifth Amendment Rights of the accused and his connections to the Republican party. *Warren E. Burger*, OYEZ, www.oyez.org/justices/warren_e_burger (last visited Feb. 3, 2019). President Nixon hoped that Chief Justice Burger's "deference to 'law and order' would reign in what many conservatives saw as liberal judicial activism." *Id.*

25. In 1969, President Nixon appointed William H. Rehnquist to the United States Supreme Court as an associate justice, in which he served for seventeen years, "stay[ing] true to his conservative values." *William H. Rehnquist*, OYEZ, www.oyez.org/justices/william_h_rehnquist (last visited Feb. 4, 2019). Then in 1986, President Ronald Reagan appointed Rehnquist to the position of Chief Justice of the United States Supreme Court upon former Chief Justice Burger's retirement. *Id.*

26. In 2005, President George W. Bush Nominated John G. Roberts as an associate justice to fill Justice Sandra Day O'Connor's vacancy. *John G. Roberts*, OYEZ, www.oyez.org/justices/john_g_roberts_jr (last visited Feb. 3, 2019). However, after the death of Justice Rehnquist, President Bush withdrew his initial nomination to instead nominate Roberts to Chief Justice of the United States Supreme Court. *Id.* Chief Justice Roberts, known for being a political pragmatist on the bench, is an avid supporter of the Court's role as an independent judiciary: to interpret the law, rather than create it. *Id.*

27. CHEMERINSKY, *supra* note 14, at 129.

28. *Id.* at 194.

29. In 1953, President Dwight D. Eisenhower nominated Earl Warren to be the Chief Justice of the United States Supreme Court. *Earl Warren*, OYEZ, www.oyez.org/justices/earl_warren (last visited Feb. 3, 2019). Chief Justice Warren "joined the Court in the midst of some of its most important issues—racial segregation in public schools and the expansion

left the bench in 1969 helps illustrate the Court's conservative approach to free speech.[30]

Beginning in 1971, Robert H. Bork, a future United States Supreme Court nominee and prominent conservative law professor at the time, wrote that "[c]onstitutional protection should be accorded only to speech that is explicitly political," and that "[t]here is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[31] Bork's view is a clear rejection of the free speech claims presented to the Warren Court in the 1950s and 1960s, which involved anti-obscenity, civil rights, and public protests claims.[32] At this time, it was the Left who led the conversation on supporting broad First Amendment protections for all, such as "fighting to protect sexually explicit materials from government censorship"[33] and even supporting "the right of the American Nazi Party to march among Holocaust survivors."[34] This is quite the opposite of what is seen today on both the Left and Right.[35]

This change is first noticeable five years after the publication of Bork's conservative stance on free speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[36] the Court considered "a challenge to a state law that banned advertising the prices of prescription drugs."[37] The claim, filed by Public Citizen, a consumer rights group founded by Ralph Nader,[38] attacked the state law as violating the First and Fourteenth Amendments.[39] Persuaded by the consumer advocates' argument that the law hurt consumers, the Court held that "[t]he First Amendment protects

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of civil liberties." *Id.* "Growing liberal with age, much of Warren's decisions were still rooted in Progressive beliefs supported by the rule of common law." *Id.*

30. *See, e.g.*, Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 783-84 (1975).

31. Liptak, *supra* note 12.

32. *Id. See generally* Street v. New York, 394 U.S. 576 (1969); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); United States v. O'Brien, 391 U.S. 367 (1968); Yates v. United States, 354 U.S. 298 (1957).

33. Liptak, *supra* note 12; *see also* Stanley v. Georgia, 394 U.S. 557 (1969).

34. Liptak, *supra* note 12; *see also* Nat'l Socialist Party v. Skokie, 432 U.S. 43 (1977).

35. Liptak, *supra* note 12 (quoting Floyd Abrams, a lawyer specializing in the First Amendment) ("Now the progressive community is at least skeptical and sometimes distraught at the level of First Amendment protection which is being afforded in cases brought by litigants on the right.").

36. 425 U.S. 748 (1976).

37. Liptak, *supra* note 12.

38. Ralph Nader is a well-known consumer activist and environmentalist. Beth Rowen, *Ralph Nader: Consumer Advocate and Presidential Hopeful*, INFOPLEASE, https://www.infoplease.com/ralph-nader (last updated Feb. 28, 2017). Nader, along with his followers, advocate for "protections for workers, taxpayers, and the environment and [fight] to stem the power of large corporations." *Id.*

39. *Va. Citizens Consumer Council*, 425 U.S. at 749-50.

the advertisement because of the 'information of potential interest and value' conveyed, rather than because of any direct contribution to the interchange of ideas."[40] While this decision seemed to be a win for consumers, it soon became one of "the biggest boomerangs in judicial cases ever."[41]

Subsequent rulings made clear the true beneficiary of *Virginia Citizens*: corporate speakers.[42] The Court was soon flooded with corporate speech cases claiming First Amendment challenges to the inclusion of alcohol content on beer can labels, the limitation of outdoor tobacco advertising near schools, rules governing how compounded drugs may be advertised, gun control laws, securities regulations, country-of-origin labels, graphic cigarette warnings, and limits on off-label drug marketing.[43] Indeed, corporate speakers effectively used the First Amendment to achieve their own agendas.[44] This trend continues today and, in fact, is even more pronounced under the Roberts Court.[45]

2. *Conservative Free Speech Intensifies Under the Roberts Court*

According to a study prepared for the New York Times,[46] the United States Supreme Court, under Chief Justice Roberts, has heard a larger share of First Amendment cases concerning conservative speech than its predecessors, ruling in favor of conservative speech at a considerably higher rate than liberal speech.[47] Indeed, "'[t]he Roberts Court—more than any modern court—has trained its sights on speech promoting conservative values,' the study found."[48] A few noteworthy cases illustrate these findings.

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40. *Id.* at 780 (citing Bigelow v. Virginia, 421 U.S. 809, 820 (1975)). Notably, the sole dissent in the decision came from the Court's most conservative member at the time— future Chief Justice William H. Rehnquist. *Id.* at 790 (Rehnquist, J., dissenting) ("I do not believe that the First Amendment mandates the Court's 'open door policy' toward such commercial advertising.").

41. Liptak, *supra* note 12.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* ("[T]he study . . . was conducted by Lee Epstein, a law professor and political scientist at Washington University in St. Louis; Andrew D. Martin, a political scientist at the University of Michigan and the dean of its College of Literature, Science and the Arts; and Kevin Quinn, a political scientist at the University of Michigan.").

47. *Id.*

48. *Id.* Contrast these results with those of the Warren, Burger, and Rehnquist Courts. The Warren Court, from 1953 to 1969, "was almost exclusively concerned with cases concerning liberal speech. Of its 60 free-expression cases, only five, or about 8 percent, challenged the suppression of conservative speech." *Id.* The Burger Court, from 1969 to 1986, saw a rise in the proportion of challenges to restrictions on conservative speech to 22%, with a win

On May 30, 2006, the Court decided "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties[,]" in *Garcetti v. Ceballos*.[49] Ultimately, the Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."[50] However, the true implications of the case encompassed far more than ordinary speech made pursuant to the employee's official duties. Rather, the Court was protecting the Government's retaliatory conduct against Ceballos.[51]

The case involved Richard Ceballos, a long-time deputy district attorney for the Los Angeles County District Attorney's Office,[52] who challenged the veracity of a deputy sheriff in regard to an affidavit he signed to obtain a search warrant.[53] Ceballos contacted the officer to discuss inaccuracies he found.[54] Unsatisfied with the officer's answers, Ceballos filed a memo with his superiors expressing his concerns and recommending dismissal of the case.[55] His superiors decided to continue with the case pending the disposition of the defendant's motion to traverse the evidence, in which Ceballos himself was called as a witness for the defense.[56] Ultimately, Ceballos faced retaliation for his conduct[57]—conduct which is arguably seen as being a whistleblower.[58]

Ceballos sued, alleging that the "petitioners violated the First . . . Amendment[] by retaliating against him based on his memo" because the memo constituted protected speech.[59] "Although the Supreme Court long has held that there is constitutional protection for the speech of government employees, it ruled against Ceballos and concluded that he could not bring a claim for the violation of

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rate of 70% for conservative speech and 47% for liberal speech. *Id.* Additionally, the Rehnquist Court, from 1986 to 2005, saw a rise in the proportion of challenges to restrictions on conservative speech to 42%, with a win rate of 63% for conservative speech and 48% for liberal speech. *Id.*

49. 547 U.S. 410, 413 (2006).
50. *Id.* at 426.
51. CHEMERINSKY, *supra* note 14, at 196.
52. *Garcetti*, 547 U.S. at 413.
53. *Id.* at 413-14.
54. *Id.* at 414.
55. *Id.*
56. *Id.* at 414-15.
57. *Id.* at 415.
58. *See id.* at 428-29 (Souter, J., dissenting); CHEMERINSKY, *supra* note 14, at 196.
59. *Garcetti*, 547 U.S. at 415 (majority opinion).

his First Amendment rights."[60] The majority chose to narrowly tailor First Amendment principles, drawing a distinction between speech made "as a citizen" and speech made "as a public employee."[61] Under the Court's view, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[62] Accordingly, speech is largely unprotected when it is made pursuant to a public employee's employment duties.[63] Because this unprecedented distinction only protected speech made as a private citizen, Ceballos's claims were nullified.[64]

Similarly, on January 21, 2010, the Court overruled precedent it had recently decided to instead favor corporate speech in *Citizens United v. Federal Election Commission*.[65] In *Citizens United*, the Court was asked to reconsider *Austin v. Michigan Chamber of Commerce*,[66] a 1990 decision, and, in effect, *McConnell v. Federal Election Commission*,[67] a 2003 decision.[68] Ultimately, the Court overruled *Austin* and *McConnell*, holding that "corporations have the First Amendment right to spend money in election campaigns."[69]

The case concerned Citizens United, a nonprofit corporation that released a film depicting then presidential candidate Hillary Clinton.[70] While the film *Hillary: The Movie*[71] was released in theaters and on DVD, Citizens United sought to increase distribution and make the film available through video-on-demand.[72] Citizens United wanted to advertise the free offering through broadcast and cable television.[73] However, "federal law prohibited . . . corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any

60. CHEMERINSKY, *supra* note 14, at 195. Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. *Garcetti*, 547 U.S. at 413.
61. CHEMERINSKY, *supra* note 14, at 195.
62. *Garcetti*, 547 U.S. at 421-22.
63. *Id.*
64. CHEMERINSKY, *supra* note 14, at 195.
65. 558 U.S. 310 (2010).
66. 494 U.S. 652 (1990).
67. 540 U.S. 93 (2003).
68. *Citizens United*, 558 U.S. at 319.
69. CHEMERINSKY, *supra* note 14, at 197.
70. *Citizens United*, 558 U.S. at 319.
71. HILARY: THE MOVIE (Citizens United 2008).
72. *Citizens United*, 558 U.S. at 320.
73. *Id.*

form of media, in connection with certain qualified federal elections."[74] Fearing the film and its advertisements would be barred by the federal ban, Citizens United filed for injunctive relief, claiming the law was unconstitutional under the First Amendment.[75]

The question to overrule *Austin* and *McConnell* sparked a multitude of opinions among the Justices,[76] but ultimately, the majority expanded free speech rights, striking down the regulatory restrictions.[77] The Court rationalized that more speech is better for the public good in response to the arguments proffered for upholding the restrictions by Citizens United's opponents, such as the prevention of corporate corruption.[78] Thus, the Court chose to protect corporate speech and a corporation's ability to spend money in election campaigns.[79]

Lastly, on June 26, 2018, the day prior to its ruling in *Janus*, the Court decided *National Institute of Family and Life Advocates v. Becerra*.[80] In *Becerra*, the Court determined whether a California law requiring licensed and unlicensed perinatal care clinics to notify pregnant mothers of "free or low-cost services, including abortions," and to provide contact information for such services, violated the First Amendment.[81] The FACT Act's stated purpose sought to promote California residents' knowledge of their personal reproductive health care and address the issue of licensed and unlicensed crisis pregnancy centers run by organizations opposed to abortion.[82] The petitioners, one such organization, filed suit after the Governor of California signed the FACT Act into law.[83]

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74. *Id.*

75. *Id.* at 321.

76. *See id.* at 317 ("Kennedy, J., delivered the opinion of the Court, in which Roberts, C.J., and Scalia and Alito, JJ., joined, in which Thomas, J., joined as to all but Part IV, and in which Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined as to Part IV. Roberts, C.J., filed a concurring opinion, in which Alito, J., joined; Scalia, J., filed a concurring opinion, in which Alito, J., joined, and in which Thomas, J., joined in part. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part.").

77. *Id.* at 365.

78. Steven Andre, *Government Election Advocacy: Implications of Recent Supreme Court Analysis*, 64 ADMIN. L. REV. 835, 842 (2012).

79. CHEMERINSKY, *supra* note 14, at 197.

80. 138 S. Ct. 2361 (2018).

81. *Id.* at 2368 (citing CAL. HEALTH & SAFETY CODE § 123470 (West, Westlaw through 2019 Reg. Sess.)) ("The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers . . . are 'pro-life . . . organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.'").

82. *Id.* at 2369-70.

83. *Id.* at 2370.

The majority,[84] authored by Justice Clarence Thomas,[85] struck down the law's notice requirements, holding that the law violated the First Amendment.[86] In regard to the licensed facilities, the majority refused to recognize a new category for "professional speech," because doing so would "exempt [it] from ordinary First Amendment principles."[87] While the majority recognized that the Court had granted this type of speech lesser protections in two situations,[88] it did not view the California law to fit within those situations.[89] Further, the majority did not view the law to achieve its stated purpose of promoting health care knowledge; thus, it concluded the law could not even meet the lesser standard of intermediate scrutiny.[90]

In regard to the unlicensed facilities, the majority cited precedent which required "disclosures to remedy a harm that is 'potentially real not purely hypothetical' and to extend 'no broader than reasonably necessary.'"[91] However, the majority opined that California had not "demonstrated any justification . . . that [was] more than 'purely hypothetical.'"[92] Even if it had, the majority concluded that the law nonetheless burdened speech because the "disclosure requirement [was] wholly disconnected from California's informational interest."[93]

For all of these reasons, the majority believed that the petitioners were likely to succeed on the merits and reversed and remanded the case back to the lower court.[94] In dissent, Justice Stephen Breyer[95]

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84. *Id.* at 2367 (joining the majority opinion were Roberts, C.J., and Kennedy, Alito, and Gorsuch, JJ.).

85. In 1991, Clarence Thomas, "known for his quiet, stoic demeanor during oral arguments and his conservative viewpoint that challenges, if not surpasses, even Scalia's originalism," was appointed by Republican President George H. W. Bush. *Clarence Thomas*, Oyez, https://www.oyez.org/justices/clarence_thomas (last visited Feb. 6, 2019).

86. *Becerra*, 138 S. Ct. at 2378.

87. *Id.* at 2375.

88. First, the Court's precedent has "applied more deferential review to some laws that require professionals to disclose *factual, noncontroversial information* in their 'commercial speech.'" *Id.* (internal citations omitted) (emphasis added). Second, the Court's precedents have permitted states to "regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)).

89. *Id.* at 2372.

90. *Id.* at 2375.

91. *Id.* at 2377 (citations omitted).

92. *Id.* (citations omitted).

93. *Id.*

94. *Id.* at 2378.

95. In 1994, Democratic President Bill Clinton appointed Stephen G. Breyer to the United States Supreme Court, who since "has cultivated a reputation for pragmatism, optimism, and cooperation with both political parties." *Stephen G. Breyer*, OYEZ, https://www.oyez.org/justices/stephen_g_breyer (last visited Feb. 6, 2019).

viewed the majority's analysis as "a misuse of First Amendment principles."[96] Specifically, Justice Breyer stated that "[u]sing the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech."[97] Indeed, Justice Breyer's concern for this misuse of First Amendment principles directly relates to Justice Kagan's future remarks of weaponizing the First Amendment.[98]

B. The Janus *Decision*

On June 27, 2018, this increasingly conservative trend culminated in the Court's decision of *Janus v. AFSCME, Council 31*.[99] From the very start, the case was viewed as an effort to thwart Illinois labor unions' abilities in the collective bargaining process.[100] Using the First Amendment as an outcome-oriented tool, the conservative majority validated the six-year attack on public employee unions and fair-share fee agreements.[101]

1. Background

Over forty years ago, the Court first considered the constitutional question of fair-share agreements[102] in *Abood v. Detroit Board of Education*.[103] The constitutional challenge to fair-share fees presented in *Abood* was whether "[r]equiring the payment of [fair-share] fees by nonmember objectors is a violation of the objectors' First Amendment rights."[104] The *Abood* Court agreed that fair-share fees were a violation to a certain extent.

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96. Liptak, *supra* note 12.
97. *Becerra*, 138 S. Ct. at 2383 (Breyer, J., dissenting).
98. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (citing *Becerra*, 138 S. Ct. at 2361).
99. *Id.*
100. Catherine L. Fisk, Janus*: Weaponized First Amendment Shoots at Democracy*, AM. CONST. SOC'Y (July 2, 2018), https://www.acslaw.org/acsblog/janus-weaponized-first-amendment-shoots-at-democracy/.
101. *Id.*
102. Fair-share agreements require non-union members of a collective bargaining agreement to pay their "fair share" of dues to the union in compensation for the benefits they receive through the collective bargaining process. David Kreutzer & Rachel Greszler, *The* Janus *Decision Scored a Major Win for Workers' Rights. Here's What Should Come Next.*, DAILY SIGNAL (July 16, 2018), https://www.dailysignal.com/2018/07/16/the-janus-decision-scored-a-major-win-for-workers-rights-heres-what-should-come-next/.
103. 431 U.S. 209 (1977).
104. McNicholas et al., *supra* note 18.

The unanimous Court affirmed that fair-share fees "could be collected from public-sector workers . . . [because] any minor infringement . . . posed by [fair-share] fees was justified by the state's legitimate interest in preventing free riders from undermining a union's ability to represent the bargaining unit."[105] However, the Court also recognized that the "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment."[106] Accordingly, the Court struck a balance between the competing interests.[107] The Court required unions to separate out the portion of fair-share fees used "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."[108]

The vast majority of caselaw following *Abood* primarily focused on the application of the Court's compromise, adjudicating whether union expenditures were proper and consistent with *Abood's* holding,[109] rather than continuing to dispute the constitutionality of the fees overall.[110] However, that is not to say the case was without criticism. Anti-union organizations, which disapproved of the Court's decision, continued to litigate and challenge fair-share fees in an effort to weaken union efforts.[111] Such challenges intensified over the past decade,[112] ultimately leading to the final challenge in *Janus*. This final challenge came in light of clear signals from the Court that it was ready to reconsider *Abood*.[113]

The first such signal was found in the Court's decision of *Knox v. SEIU*.[114] The issue in *Knox* centered around the type of notice a

105. *Id.*
106. *Id.*
107. *Id.*
108. *Abood*, 431 U.S. at 235.
109. *See, e.g.*, Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447 (1984).
110. Joe E. Ling, Note, *Transgression of a Timid Judiciary: Our Highest Court's Refusal to Overturn* Abood v. Board of Education—Harris v. Quinn, 42 WM. MITCHELL L. REV. 1237, 1245 (2016).
111. McNicholas et al., *supra* note 18.
112. Knox v. Serv. Emp. Int'l Union, Local 1000, 567 U.S. 298 (2012); Harris v. Quinn, 134 S. Ct. 2618 (2014); Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015).
113. McNicholas et al., *supra* note 18.
114. 567 U.S. 298 (2012).

union is required to give nonmembers after it levied a special assessment or dues increase.[115] While Justice Samuel Alito,[116] writing for the majority, outlined the controlling precedent regarding fair-share fees and analyzed the merits of the case, he also added in his own criticism of the Court's free speech case law.[117] Specifically, Justice Alito commented on the free-rider justification first proffered in *Abood*—the risk of non-union members enjoying a "free ride" justifies the use of fair-share fees.[118] Regarding this argument, he stated in dicta that it "represents something of an anomaly."[119] It is this statement that "[m]any observers considered . . . [as] an invitation to argue for overturning *Abood*[,]" as it evinced the Court's, or at least Justice Alito's, willingness to reconsider the long-standing precedent's merits.[120]

Two years later, in *Harris v. Quinn*,[121] the first corporate-backed plaintiffs took up Justice Alito's invitation by filing a challenge against fair-share fees.[122] The case involved Illinois home-care workers who were nonmember parties to a collective bargaining unit which contained a fair-share fee agreement.[123] The petitioners, represented by the National Right to Work Legal Defense Foundation,[124] argued that such agreements violated the employees' First Amendment rights because the agreements compelled them to pay a fee into a union in which they did not wish to support.[125]

Again, Justice Alito wrote the majority opinion for the Court, joined by the Court's remaining conservative members.[126] The majority began by noting the lower court's reliance on *Abood*, in which the Seventh Circuit concluded that the home-care workers were

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115. *Id.* at 305-06.

116. Justice Alito was appointed by President George W. Bush in 2005 and is "known for his right wing leanings that sometimes encompass libertarian ideals." *Samuel A. Alito*, OYEZ, www.oyez.org/justices/samuel_a_alito_jr (last visited Feb. 2, 2019).

117. *Knox*, 567 U.S. at 300.

118. The free-rider argument justifies fair-share fees on the premise that such fees "counteract[] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977). The same justification was affirmed in subsequent rulings. *See, e.g.*, Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

119. *Knox*, 567 U.S. at 311.

120. McNicholas et al., *supra* note 18.

121. 134 S. Ct. 2618 (2014).

122. McNicholas et al., *supra* note 18.

123. *Id.*

124. *Id.*

125. *Harris*, 134 S. Ct. at 2626.

126. *Id.* at 2623.

public employees that fit within the precedent's confines.[127] However, the majority distinguished the home health-care workers from "full-fledged" public employees because they were only recognized as public employees for the purposes of collective bargaining.[128] Under the majority's view, this slight distinction removed the case from analysis under the controlling precedent of *Abood*.[129] Indeed, Justice Alito viewed any application of *Abood* to be a "substantial expansion" of the precedent's reach.[130]

Accordingly, the Court considered whether fair-share fees serve "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms[,]" in regard to this special class of employees.[131] Ultimately, the Court held that it did not; thus, such arrangements violated the First Amendment rights of these employees.[132]

However, this holding was limited to the special class of employees at issue, those employees deemed to not be "full-fledged" public employees.[133] Thus, rather than overruling *Abood*, the Court merely held that *Abood* did not apply in this context.[134] Notably, Justice Alito again commented on *Abood's* justifications in dicta, noting his prior statement in *Knox* that "*Abood* is 'something of an anomaly.'"[135]

On June 30, 2015, the Court granted certiorari on what seemed to be the final domino in the chain of cases pushing for the overturning of *Abood*: *Friedrichs v. California Teachers Association*.[136] The plaintiff, Rebecca Friedrichs, alongside nine other public school teachers, directly challenged *Abood*.[137] The teachers argued that

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127. *Id.* at 2627-28.

128. *Id.* at 2634 ("*Abood* involved full-fledged public employees, but in this case, the status of the personal assistants is much different. The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private-sector employees.").

129. *Id.*

130. *Id.*

131. McNicholas et al., *supra* note 18 (quoting *Harris*, 134 S. Ct. at 2639).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Harris*, 134 S. Ct. at 2627 (quoting Knox v. SEIU, 567 U.S. 298, 311 (2012)).

136. 135 S. Ct. 2933 (2015).

137. The plaintiffs in the case were represented by the Center for Individual Rights (CIR). Knowing their First Amendment argument had already been answered by the long-standing precedent of *Abood*, CIR rushed the case through the lower courts. CIR filed a motion for judgment on the pleadings, which the union opposed asking for the opportunity to introduce information on the necessity of fair-share fees, which would be the corner stone of the union's position to uphold *Abood*. However, the trial court ruled on the pleadings alone, as *Abood* clearly controlled, skipping any opportunity to call witnesses, take testimony, and conduct discovery. The plaintiffs then appealed to the Ninth Circuit Court of Appeals, which affirmed

being required to make any financial contribution to their unions through fair-share fee agreements was a violation of their First Amendment rights.[138] Oral arguments were held on January 11, 2016, and predictions did not fare well for upholding *Abood* after their closing.[139] However, due to the unfortunate death of Justice Scalia on February 13, 2016, the Court was unable to issue a determinative decision, ending the dispute in a 4-4 tie.[140] This "left the door open [for Governor Bruce Rauner and Mark Janus] to continue the attack on [fair-share] fees."[141]

On September 28, 2017, the United States Supreme Court granted Petitioner, Mark Janus's (hereinafter "Janus") writ of certiorari,[142] which explicitly asked the Court to overrule *Abood* and hold public-sector fair-share fee agreements unconstitutional.[143] In a seven-part opinion, Justice Alito again delivered the majority opinion of the Court and again was joined by the Court's remaining conservative members.[144] Justice Elena Kagan, joined by the remaining liberal members of the Court, filed a dissenting opinion.[145]

2. Factual Background

At first blush, *Janus*, like much of the Court's recent First Amendment altering decisions, appeared to be an issue of labor law

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the lower decision, again relying on the controlling case of *Abood*. This allowed the plaintiffs to petition the United States Supreme Court for review. McNicholas et al., *supra* note 18.

138. Friedrichs v. Cal. Teachers Ass'n, No. SACV 13-676-JLS (CWx), 2013 WL 9825479, at *2 (C.D. Cal. Dec. 5, 2013); McNicholas et al., *supra* note 18.

139. McNicholas et al., *supra* note 18.

140. *Id.*

141. *Id.*

142. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). The initial case against Respondent, American Federation of State, County, and Municipal Employees, Council 31, was filed by newly elected Illinois State Governor, Bruce Rauner. Lynn Sweet & Jon Seidel, *In a Blow to Unions, Government Workers No Longer Have to Pay 'Fair Share' Fees*, CHI. SUN TIMES (July 7, 2018, 10:38 AM), https://chicago.suntimes.com/columnists/ruling-mark-janus-afscme-council-31-supreme-court-unions-fair-share-fees-collective-bargaining-bruce-rauner/. Janus, along with Brian Trygg, who was later precluded from bringing his claim because of his involvement in a prior suit, *Janus v. AFSCME, Council 31*, 851 F.3d 746, 748 (7th Cir. 2017), intervened in the Governor's lawsuit after the District Court ruled that Rauner did not have standing to bring the case. Sweet & Seidel, *supra* note 142. Janus filed an amended complaint, claiming that "all 'nonmember fee deductions are coerced political speech' and that 'the First Amendment forbids coercing any money from the nonmembers.'" *Janus*, 138 S. Ct. at 2462. In response, Respondent filed a motion to dismiss on the basis that Petitioner's claims were foreclosed by the Court's decision in *Abood v. Detroit Board of Education*, which the District Court granted, and the Court of Appeals affirmed. *Id.*

143. Both Petitioner Janus and intervenor Trygg acknowledged they would not prevail at the lower courts; however, the process was a necessary step in reaching their ultimate goal of having agency fee agreements found unconstitutional, which could only be accomplished at the United States Supreme Court. *Janus*, 851 F.3d at 747-48.

144. *Janus*, 138 S. Ct. at 2459, 2486.

145. *Id.* at 2487.

and fair-share fees. But underneath the decision laid the same conservative outcome-oriented application of the First Amendment seen in *Citizens United*, *Garcetti*, and *Becerra*. The present case, arising out of Illinois, focused on fair-share fee agreements in the public sector. At its base, Illinois permits public-sector employees to unionize under the Illinois Public Labor Relations Act (IPLRA).[146] Under the IPLRA, a union may be designated as the exclusive representative over all employees by a majority vote.[147] Although employees remain free to refuse union membership, the union is still charged with the responsibility to represent the interest of all members and nonmembers in the collective bargaining unit alike.[148] Indeed, regardless of actual membership, a union works for and provides services to all employees. As decided by *Abood*, and contingent on a fair-share fee agreement, nonmembers were required to pay a reduced fee, excluding any portion of union dues used for political or ideological projects.[149]

The petitioner, Mark Janus, a child support specialist at the Illinois Department of Healthcare and Family Services, was represented by Respondent American Federation of State, County, and Municipal Employees, Council 31 (hereinafter "Union"), alongside 35,000 other public employees.[150] Because Janus opposed many of the public policy positions that the Union advocated for, he refused to join; accordingly, Janus was considered a nonmember party to his respective bargaining agreement.[151] Indeed, Janus's dissatisfaction was so severe that he opposed having to pay any sum to the Union for the services he did receive.[152] However, under his unit's collective bargaining agreement, Janus was nonetheless "required to pay [a fair-share] fee of $44.58 per month," or $535 per year, pursuant to his union-negotiated contract.[153] In his complaint, Janus claimed that all nonmember fee deductions, including the $535 he was required to pay each year, "'are coerced political speech' and that 'the First Amendment forbids coercing any money from . . . nonmembers.'"[154]

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146. 5 ILL. COMP. STAT. ANN. 315/6(a) (2019) (LEXIS through 2019 Reg. Sess.).
147. *Janus*, 138 S. Ct. at 2460.
148. *Id.*
149. *Id.* at 2460-61. Ultimately, agency fees represent a nonmember's "proportionate share," a reduced percentage of the full dues which accounts for and excludes the proportionate percentage of nonchargeable expenditures. *Id.* at 2461.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 2462.

3. The Majority's Analysis

The majority opinion, again authored by Justice Alito, and again joined by the Court's remaining conservative members, started its analysis by turning to the main issue presented before the Court: the constitutionality of *Abood v. Detroit Board of Education*.[155] To address this issue, the majority subdivided its analysis of *Abood* into three different sections.[156] First, it considered whether *Abood's* holding was consistent with First Amendment principles, determining that fair-share fee agreements do raise First Amendment concerns.[157] Accordingly, in the remaining two subsections, it applied exacting scrutiny to *Abood's* two justifications for fair-share fees—the state's interest in labor peace and the risk of free riders, respectively.[158]

Before doing so, the majority briefly recapped First Amendment protections, noting that the First Amendment forbids abridgement of the freedom of speech and that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."[159] The majority concerned itself with the negative right of the First Amendment to be free of compelled speech.[160] When speech is compelled, the majority continued, additional damage is done to the essential functions that the First Amendment serves because forcing free and independent individuals to endorse ideas they find objectionable effectively coerces such individuals into betraying their convictions, a more urgent concern than simply forcing silence.[161]

While Janus's situation is not exactly compelled speech, the majority noted that forcing a person "to subsidize the speech of other private speakers raises similar First Amendment concerns."[162] From this distinction, the majority "recognized that a 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining [which] have powerful political and civic consequences.'"[163] "Because the compelled subsidization of private speech seriously impinges on First

155. *Id.* at 2463.
156. *Id.* at 2463-69.
157. *Id.* at 2463-64.
158. *Id.* at 2465-69.
159. *Id.* at 2463 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).
160. *Id.* at 2464.
161. *Id.*
162. *Id.* (citing Knox v. SEIU, Local 1000, 567 U.S. 298, 309 (2012); United States v. United Foods, Inc., 533 U.S. 405, 410 (2001); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977)) (emphasis omitted).
163. *Id.* (quoting *Knox*, 567 U.S. at 310-11).

Amendment rights," the majority opined that "it cannot be casually allowed."[164]

Accordingly, the majority turned to the different "levels of scrutiny" to be applied, which it highlighted through recent free speech cases.[165] Ultimately, it applied intermediate scrutiny, rather than the more stringent strict scrutiny standard, to evidence that the alleged constitutional infringement at issue could not even pass a lesser standard of review.[166]

Accordingly, the majority turned to the two justifications for fair-share fee agreements accepted in *Abood*—the state's interest in labor peace and the risk of free riders.[167] However, it did not find either of these justifications compelling.[168] Specifically, it believed "labor peace" could be achieved through significantly less restrictive means than fair-share fee agreements.[169] It supported this contention by recognizing that federal law, the postal service, and twenty-eight states all prohibit fair-share fees while sustaining the collective bargaining process.[170] Additionally, the majority opined that the risk of free riders is never a compelling argument to overcome a First Amendment challenge.[171] It believed that simply because an advocacy group's efforts may benefit nonmembers who are in no way affiliated with the group itself, with nothing further, does not mean the advocacy group's speech is to be automatically subsidized by those who receive some benefit but are otherwise unaffiliated

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164. *Id.*

165. *Id.* at 2464 (citing *Knox*, 567 U.S. 298; Harris v. Quinn, 134 S. Ct. 2618 (2014); Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam)). The hierarchical schema of judicial analysis that the Court uses in First Amendment cases ranges from "strict scrutiny," the most stringent standard, to "intermediate" or "exacting scrutiny," and, finally, to "minimum scrutiny" or "rational-basis review," the most deferential standard. "Under strict scrutiny, the state must establish that is has a compelling interest that justifies and necessitates the law in question." *Strict Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Under 'exacting' scrutiny . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms,'" that applies outside of the commercial sphere. *Janus*, 138 S. Ct. at 2465 (internal citations omitted). Finally, under minimum scrutiny, "the [C]ourt will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective." *Rational-Basis Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

166. *Janus*, 138 S. Ct. at 2465. The majority quickly dismissed the dissent's argument that the justifications for *Abood* should be considered under the minimum scrutiny standard, stating that it was "foreign to . . . free speech jurisprudence." *Id.*

167. *Id.*

168. *Id.* at 2465-69.

169. The *Abood* Court defined "labor peace" as, the "avoidance of the conflict and disruption that . . . would occur if the employees in a [bargaining] unit were represented by more than one union." *Id.* at 2465 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-21 (1977)).

170. *Id.* at 2466.

171. *Id.*

with such group.[172] Accordingly, the majority dismissed both arguments.[173]

The majority then considered two main alternative justifications presented by the Union and its *amici curiae*. First it considered an originalist argument—whether *Abood* was correctly decided because the "First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees."[174] Next, it considered whether other precedent controlled—specifically, whether *Abood* is based on *Pickering v. Board of Education*.[175]

The majority dispensed with the originalist argument with little consideration, noting that it ultimately would result in no free speech rights of public employees, a consequence the Union could not have intended.[176] Further, it recognized and considered that this would render countless precedents meaningless, in direct opposition to the principles of *stare decisis*.[177] Therefore, the majority found the originalist argument unpersuasive.[178]

Next, the majority turned to the justification that *Abood* was based on *Pickering*. However, it quickly responded that it was not.[179] The majority pointed out that *Abood's* slight reference of *Pickering*—an acknowledgement in a footnote—did not have any bearing on the issue.[180] For this reason, the majority viewed this justification as an unwarranted attempt to fit *Abood* into the *Pickering* framework.[181] Nonetheless, assuming arguendo that *Abood* did fit within *Pickering's* framework, the majority analyzed it as such.[182] Indeed, it determined that *Abood* would still not survive.[183]

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172. *Id.* (citing Knox v. SEIU, Local 1000, 567 U.S. 298, 311 (2012)). Justice Alito supported this conclusion with a hypothetical. The Justice compared a union's situation to that of a lobbyist group advocating for senior citizens, veterans, or another group of the like. In his view, although these types of groups advocate for the benefit of individuals in no way affiliated with their organization, their advocacy does not grant them a right to compel those who may directly or indirectly benefit to pay for such speech. *Id.* at 2466-67.

173. *Id.* at 2469.

174. *Id.*

175. *Id.* at 2471 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

176. *Id.* at 2469-71.

177. *Id.* at 2469-70.

178. *Id.* at 2470-71.

179. *Id.* at 2471-72.

180. *Id.* at 2472.

181. *Id.*

182. *Id.*

183. *Id.* Under the *Pickering* framework, the majority first considered (1) whether the present speech should be treated as speech "pursuant to [an employee's] official duties," (2) "whether the speech is on a matter of public or only private concern," and (3) "whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests." *Id.* at 2474-77.

Notably, within its *Pickering* analysis, the majority believed that fair-share fee agreements did not constitute speech pursuant to an employee's official duties—which was the case in *Garcetti*, discussed *supra*—because a contrary holding would distort the reality of collective bargaining.[184] In differentiating *Garcetti*, it noted that a union member or a nonmember's speech in his or her capacity as a member or nonmember of the union is substantially different from that of regular employees, because when a member or nonmember speaks in his or her regular capacity they speak for the employees, rather than for the employer.[185] In the majority's view, this distinction removed the current speech from consideration under *Garcetti's* standard, meaning that the present speech should not be treated as "pursuant to [an employee's] official duties."[186]

Additionally, the majority opined that union speech in collective bargaining addresses many other important matters of public concern—such as education, child welfare, healthcare, and minority rights—because the topics of collective bargaining inherently seek to answer policy questions about such.[187] Therefore, the majority determined that speech made pursuant to collective bargaining "overwhelmingly" consists of "substantial" matters of public concern, warranting First Amendment protection.[188]

With all of this considered, the majority concluded that *Abood* was improperly decided. Yet it did not simply end its analysis. Rather, it went on to consider whether the principles of *stare decisis* counseled against overruling the longstanding precedent.[189] At the outset of this analysis, the majority noted that the doctrine is at its weakest in the context of constitutional rights.[190] Specifically, it opined that *stare decisis* should apply with perhaps the least amount of force to decisions which wrongly denied First Amendment rights, stating that: "This Court has not hesitated to overrule

184. *Id.* at 2474.
185. *Id.*
186. *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).
187. *Id.* at 2475-76 ("Take the example of education . . . [t]he public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and education is typically the largest component of state and local government expenditures. Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?").
188. *Id.* at 2477.
189. *Id.* at 2478.
190. *Id.* (citing Agostini v. Felton, 521 U.S. 203, 235 (1997)).

decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."[191] Ultimately, after considering the different factors to be taken into account under the doctrine, the majority held that *stare decisis* did not counsel against overruling *Abood*.[192]

Justice Alito concluded the roughly twenty-six-page majority opinion by succinctly stating that *Abood* was poorly decided and, therefore, overruled.[193] Accordingly, the majority held that "[s]tates and public-sector unions may no longer extract [fair-share] fees from nonconsenting employees."[194] Thus, neither a fair-share fee "nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."[195]

4. Dissenting Opinion

Authoring the dissent,[196] Justice Elena Kagan's displeasure with the majority's ruling is immediately apparent.[197] In her opening, Justice Kagan comments that "the Court succeed[ed] in its 6-year campaign to reverse *Abood*," noting Justice Alito's prior "anomaly" comments in *Knox* and *Harris*.[198] In a rare and animated dissent, Justice Kagan continued to outline every way the majority went wrong.

At the forefront, the dissent saw nothing "questionable" about *Abood's* analysis. It viewed the free-rider justification to be a substantial concern, quoting the late Justice Scalia, who himself recognized that prohibiting unions from collecting fair-share fees effectively requires it to carry—"to *go out of its way* to benefit [them],

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191. *Id.* at 2478 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted)) (omitting case examples).

192. *Id.* at 2486 ("All these reasons—that *Abood's* proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the 'special justification[s]' for overruling *Abood*." (citing *id.* at 2497 (Kagan, J., dissenting) (quoting Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015)))).

193. *Id.* (reversing the judgment of the Court of Appeals for the Seventh Circuit and remanding the case for further proceedings consistent with its opinion).

194. *Id.*

195. *Id.*

196. Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined in Justice Kagan's dissent. *Id.* at 2487 (Kagan, J., dissenting). All four justices joining the minority were elected by Democratic presidents. Sweet & Seidel, *supra* note 142.

197. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

198. *Id.* (citing Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam); Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298 (2012)).

even at the expense of its other interests"—nonmember free-riders.[199] In the dissent's view, the state had a compelling interest to avoid this problem, justifying any slight infringement that fair-share fees may have imposed.[200]

Additionally, the dissent severely disapproved of the majority's disregard for the principles of *stare decisis*.[201] In the dissent's view, even if *Abood* was wrong, the principles of *stare decisis* "demand[ed] a 'special justification—over and above the belief that the precedent was wrongly decided.'"[202] The dissent found no such special justification in the present case. Ultimately, the dissent seemingly categorized the majority's attempt to curtail the principles of *stare decisis* to fit its reasoning as laughable, stating it "barely limps to the finish line."[203]

The dissent concluded by continuing this severe criticism, more than implying that the majority's analysis was a partisan decision, made to pick the "winning side in . . . an energetic policy debate."[204] However, what was "most alarming" in the dissent's view, was how the majority chose the case's "winners" by effectively "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."[205] The dissent further warned that this was not the first time, nor would it likely be the last that the conservative majority had done so.[206] Effectively, Justice Kagan viewed the majority's decision as "weaponizing the First Amendment in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[207]

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199. *Id.* at 2490 (quoting Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991)).

200. *Id.* at 2490-91.

201. *Id.* at 2497 ("But the worse [sic] part of today's opinion is where the majority subverts all known principles of *stare decisis*.").

202. *Id.* (quoting Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015)).

203. *Id.* at 2501 ("The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood's* legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.").

204. *Id.* ("Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweenness). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail.").

205. *Id.*

206. *Id.* at 2501-02 ("Today is not the first time the Court has wielded the First Amendment in such an aggressive way. *See, e.g.*, Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (striking down a law that restricted pharmacies from selling various data).").

207. *Id.* at 2501.

III. ANALYSIS

A. Defining the "Weaponization of the First Amendment"

The Court sparked much debate following its decision in *Janus*. While the Left criticized the Court's analysis and reasoning, the Right justified the Court's decision, viewing it as a long-time coming.[208] However, both sides agree that *Janus's* ruling is a "blow to [labor] unions."[209]

Much of the criticism understandably comes from the Left, which views "*Janus* [as] an ideological attack on workplace and political democracy."[210] But this criticism amounts to more than just a policy debate decided under a certain ideological view; rather, it rises to the view of an all-out political attack by wealthy corporate interests on the labor movement.[211] A majority of such criticism considers the United States Supreme Court, specifically the conservative majority, as a vital part in such assault, implying that the Court no longer plays the role of an independent judiciary but rather that of an active participant.[212] This is evidenced in a few different ways.

To start, the Court has had a higher tendency to take and decide conservative free speech cases.[213] Statistically, the Roberts Court has heard far more conservative free speech cases than that of its predecessors.[214] Additionally, the Roberts Court has also decided in favor of conservative free speech in those cases more often than it has decided in favor of liberal free speech in such cases.[215] These statistics seemingly speak for themselves; the Court has been more willing to decide in favor of its majority's political ideology.

This trend undoubtedly substantiates the Court's natural willingness to hear *Janus* in the first place, as it concerned conservative speech—animus towards the labor movement. However, Justice Alito's "anomaly" statements likely played a significant role in light

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208. *See generally* Jordan Muller, *Here's Why the Supreme Court's "Right-to-Work" Ruling Is a Win for Conservatives*, OPENSECRETS.ORG (June 27, 2018, 10:03 AM), https://www.opensecrets.org/news/2018/06/janus-vs-afscme-ruling-impact-conservatives/; Fisk, *supra* note 100.

209. Sweet & Seidel, *supra* note 142.

210. Fisk, *supra* note 100.

211. Spielman et al., *supra* note 20.

212. Fisk, *supra* note 100.

213. Specifically, it has taken a 65% share of free speech cases concerning conservative speech, which is a 23% increase from the Rehnquist Court and a 57% increase from the Warren Court. Liptak, *supra* note 12.

214. *Id.*

215. The Roberts Court has ruled in favor of conservative free speech in 69% of such cases it has taken, while only ruling in favor of liberal speech in 21% of such cases. *Id.*

of this trend.[216] Anti-union organizations certainly embraced this message with open arms, as they had "picked at the seams of *Abood* for decades in an attempt to weaken the ability of unions to collect fair-share fees."[217] Indeed, such challenges gained a new momentum in light of the increasingly corporate-friendly United States Supreme Court,[218] prompting the eventual challenges to *Abood's* constitutionality by the corporate-backed plaintiffs of both *Friedrichs* and *Janus*.[219] Thus, the corporate-friendly feel of the United States Supreme Court, supplemented by the deep pockets of corporate interests, created the perfect storm for *Janus* to be brought, heard, and overruled. Yet these statistics alone are not necessarily proof that the conservative majority on the Court has used the First Amendment to its advantage. Nonetheless, other recent trends, or the lack thereof, regarding the Court's stance on free speech seemingly offer additional proof.

First, the Court has not only broadened free speech rights when necessary to serve conservative speech but has also narrowed free speech rights when necessary to do so.[220] Indeed, the Court has lacked a sense of consistency in applying free speech principles. This lack of consistency evinces an intent to favor conservative free speech, rather than merely a specific ideological stance.[221] Two cases previously discussed—*Garcetti* and *Citizens United*—begin to illustrate this point.[222]

In *Garcetti,* the Court made an unprecedented distinction between the speech of citizens and that of public employees.[223] This distinction effectively narrowed free speech rights and resulted in an enormous loss of rights for millions of public employees.[224] However, in *Citizens United,* the Court overruled long-standing precedent to grant corporations the First Amendment right to spend money in election campaigns.[225] Indeed, this decision expanded free speech protections to favor corporate speech. [226] The stark contrast

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216. McNicholas, *supra* note 18.
217. *Id.*
218. Liptak, *supra* note 12.
219. "The plaintiffs in *Harris*, *Friedrichs*, and *Janus* have all been represented by wealthy legal foundations, providing pro bono representation in each of these cases." McNicholas et al., *supra* note 18.
220. CHEMERINSKY, *supra* note 14, at 169.
221. *Id.*
222. *Id.* at 194-98.
223. *Id.* at 195.
224. *Id.* at 194.
225. *Id.* at 197.
226. *Id.* The decision was a drastic change from the Court's view seven years previously under Rehnquist. One easily identifiable change was Court personnel. Justice Alito replaced Justice O'Connor, previously in the majority against *Citizens United's* view of free speech,

between the application of free speech principles in these two cases, made roughly four years apart by the same conservative members on the Court, evince the Court's willingness to construe free speech principles in favor of conservative speech. While these two cases implicated different areas of free speech methodology, this inconsistent application can be seen in other comparable decisions, including *Janus*.

For example, in *Harris*, the Court's application of *Abood* narrowly tailored free speech principles to find fair-share fees unconstitutional against a select group of individuals.[227] Again, *Harris* dealt with what the majority in that case considered a partial-public employee, or employees that were only considered public employees for the sake of collective bargaining.[228] Thus, while these employees were indeed covered under the collective bargaining contract and declared public employees by Illinois law, the majority distinguished them nonetheless, removing them from consideration under the controlling precedent of *Abood*.[229] This distinction was enough for the majority to refrain from, as it considered, substantially expanding *Abood's* holding to govern the present case.[230] However, such distinction truly should not have made a difference in *Abood's* application.[231] Ultimately, the conservative majority again narrowed free speech principles, limiting *Abood*'s application in pursuit of finding fair-share fees unconstitutional.[232]

Further, the majority's decision in *Janus* seemingly narrows free speech as well; however, it does so through the use of its holdings in *Pickering* and *Garcetti*.[233] First, the majority quickly dismisses any application of the *Pickering* framework to *Abood*,[234] choosing to strictly apply its analysis without regard to the general principles that may be derived and applied in the case at bar.[235] Specifically, in the public employment context, the government has a much freer hand in regulating its employees' speech, as opposed to the general public.[236] In the employment realm, the government's managerial

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and effectively tipped the balance of the Court in favor of overturning the prior precedent. *Id.*

227. Harris v. Quinn, 134 S. Ct. 2618, 2634 (2014).

228. *Id.* at 2625, 2634.

229. *Id.* at 2634.

230. *Id.*

231. *Id.* at 2646 (Kagan, J., dissenting).

232. *See generally id.* at 2645-58 (explaining how the conservative majority distinguished the factual circumstances to remove the case from the controlling precedent of *Abood*, while remaining reluctant to overrule the precedent).

233. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2471-78 (2018).

234. *Id.* at 2472.

235. *Id.* at 2494 (Kagan, J., dissenting).

236. *Id.* at 2492.

interest—the need to run the government as effectively and efficiently as possible—necessitates its need to manage its workforce as it sees fit. Thus, public employees submit to certain limitations on their speech by the very nature of their employment.[237] A proper balance must, therefore, be achieved when public employees' expressive rights are at issue, between employee speech rights and the government's managerial prerogative.[238] The Court has long utilized *Pickering* in striking such balance.[239] Nonetheless, the majority takes a strict and narrow view of *Pickering's* application, ignoring that both *Pickering* and *Abood* utilize this underlying principle.[240]

Further, although the majority argued that *Garcetti's* principles did not apply,[241] *Garcetti* held that if an employee's speech is made pursuant to his or her employment duties, it is largely unprotected.[242] Accordingly, under *Garcetti*, if an employee speaks on a workplace matter, he or she has no opportunity to bring a First Amendment claim.[243] While the dissent recognized this underlying principle of *Garcetti*—that speech in the scope of employment is unprotected until it extends into the public realm[244]—the majority further narrowed its application in *Janus*, restricting it to only when an employee speaks pursuant to his or her official duties or otherwise speaks as his or her employer.[245] Thus, the majority's reasoning in *Janus* must be looked at in one of two different ways in regard to *Garcetti*: (1) the majority narrowed *Garcetti's* holding further, removing its application from the current case, or (2) the majority narrowly decided *Janus*, carving out a "unions only" exception.[246] Otherwise, the two opinions contradict.

To express this contradiction, take the underlying complaint in *Garcetti*. Ceballos's speech claim stemmed from a memorandum written to his supervisors expressing his concerns regarding an employment matter.[247] In determining whether Ceballos's speech was protected, the dispositive factor was not that his speech was made

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237. *Id.* at 2492.
238. *Id.* at 2493.
239. *Id.*
240. *Id.* ("Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression.").
241. *Id.* at 2474 (majority opinion).
242. *Id.* at 2471 (citing Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006)).
243. *Id.* at 2492 (Kagan, J., dissenting).
244. *Garcetti*, 547 U.S. at 436 (Stevens, J., dissenting).
245. *Janus*, 138 S. Ct. at 2474.
246. *Id.* at 2496 (Kagan, J., dissenting).
247. *Garcetti*, 547 U.S. at 414.

at work or about his employment—although those factors are significant—but rather that his speech was made *pursuant to* his duties as a public employee.[248] The speech was about and directed to the workplace, rather than the broader public square.[249] This is the critical question. Accordingly, had Ceballos directed his memorandum to the local news outlet, rather than his supervisor, his speech would be protected.[250] Consider a similar situation in which a public employee is subpoenaed to testify in court as to the criminal acts of his supervisor. In that situation, the employee speaks not as a public employee—although his speech undoubtedly arises out of his employment relationship—but rather as a private citizen because the speech is not made within the ordinary scope of an employee's duties, regardless of whether the speech concerns such duties.[251]

Accordingly, when it comes to the type of speech at issue in *Abood* and *Janus*, it should be seen as speech made within the ordinary scope of an employee's duties. As the dissent points out, the "essential stuff" of collective bargaining should be given the same treatment.[252] While individualized cases are easily distinguished, speech that owes itself to the collective bargaining process should be treated in the same manner because such speech is truly of the workplace or occurs because of the employment relationship. It is speech addressed to the workplace, made in the workplace, and (most of all) about the workplace.[253] This is the important question.

Nonetheless, the majority equated such speech as being directed to the public sphere because of potential budgetary consequences in one portion of its analysis.[254] It further qualified the union's speech on behalf of employees as speech made for the employees, not the employer, in another. Both views take the speech at issue out of *Garcetti's* control, causing the speech to fail at either the first or second step of the *Pickering* analysis. Thus, *Janus* can be viewed as narrowing *Garcetti's* reach by requiring speech made pursuant to one's employment duties to be speech made on behalf of his or her employer, or as a limited decision, expressing a union's only exception in which the very nature of collective bargaining justifies excluding this speech from protection. The contrast between *Janus*

248. *Id.* at 421.
249. *Janus*, 138 S. Ct. at 2471.
250. *See Garcetti*, 547 U.S. at 423-24.
251. *See* Lane v. Franks, 573 U.S. 228, 239-40 (2014).
252. *Janus*, 138 S. Ct. at 2494-96 (Kagan, J., dissenting).
253. *Id.* at 2495.
254. *Id.* at 2495-96.

and *Garcetti*—and consequently *Pickering*—again evinces the conservative majority's willingness to limit free speech principles when it serves their agenda to do so.[255]

Finally, the conservative majority on the Court again broadened free speech protections in *Becerra*.[256] The dissent in *Becerra* makes clear that the case's majority extended sound First Amendment principles far beyond the limits it should have.[257] Indeed, the majority applied such goals as "the need to protect the Nation from laws that 'suppress unpopular ideas or information' or inhibit the 'marketplace of ideas in which truth will ultimately prevail[,]'" beyond its own careful examination of how such goals should be fulfilled.[258] Ultimately, the dissent condemned the majority's broad use of the First Amendment to "strike down economic and social laws that legislatures long would have thought themselves free to enact."[259] In short, each of these cases discussed evidences that the conservative Court has curtailed First Amendment principles to produce a specific outcome in line with the ideologies of the Right.[260]

Notable in Justice Kagan's dissent were both the majority's decision of First Amendment principles and its utter disregard for all known principles of *stare decisis*. "Stare decisis has a long pedigree in the American legal tradition."[261] Often emphasized by the Court, *stare decisis* plays a critical role in ensuring that legal rules remain consistent and stable under the constant pressures of changing times and circumstances.[262] Indeed, Justice Kagan herself stresses that "[d]epartures from *stare decisis* are supposed to be 'exceptional action[s]' demanding 'special justification.'"[263] "Tellingly, in a substantial majority of cases over the past 50 years in which a constitutional precedent has been overturned, the [C]ourt has been unanimous or nearly unanimous, with two or fewer justices in dissent."[264] It follows that unanimity is seen as a reflection of the Court's decision being "founded in law rather than the proclivities of individuals" and its integrity as the independent judiciary.[265]

255. CHEMERINSKY, *supra* note 14, at 197.
256. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
257. *Id.* at 2382 (Breyer, J., dissenting).
258. *Id.*
259. *Id.* at 2383.
260. CHEMERINSKY, *supra* note 14, at 194.
261. Michael Kimberly, *Symposium: The Importance of Respecting Precedent*, SCOTUSBLOG (Dec. 20, 2017, 2:57 PM), http://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent/.
262. *Id.*
263. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).
264. Kimberly, *supra* note 261.
265. *Id.* (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

Accordingly, overruling long-standing constitutional precedent, as the majority does in *Janus*, by a strongly divided Court "raises doubts . . . about whether it is principles or politics that underlie the [C]ourt's decisions."[266] Justice Kagan implied the latter when she stated that the conservative majority accomplished such ideological goals "by weaponizing the First Amendment," in *Janus*.[267] She further warned that *Janus* had not been the first of such improper action, nor will it be the last.[268]

Such a warning seemingly stems not only from the trend of caselaw Justice Kagan refers to, but also from a potentially overlooked statement from the majority.[269] One justification for the majority's departure from *stare decisis* is that the doctrine is "at its weakest" in interpreting constitutional provisions, implying that constitutional rights themselves warrant the special justification Justice Kagan's dissent considers lacking.[270] The Court goes on to clarify that "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights."[271] On its face, this statement seems warranted to an extent. However, its potential use is exactly what the dissent warns of.

One of the dissent's many criticisms of the Court helps to illustrate this statement's potential. Justice Kagan criticized the majority, stating: "[d]on't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as 'special justifications.'"[272] She was, of course, referring to Justice Alito's comments in *Knox* and *Harris*, stating that *Janus* was somewhat of an anomaly.[273] The majority, written by Justice Alito, relied on such comments, also written by Justice Alito, in justifying its decision to overturn *Abood*.[274] The conflict with this situation is blatantly obvious.

In fact, the majority's analysis of *Abood's* constitutionality begins with a recap of the Justice's past criticism.[275] Justice Alito opens by saying:

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266. *Id.*
267. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).
268. *Id.*
269. *Id.* at 2501-02.
270. *Id.* at 2478 (majority opinion) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).
271. *Id.*
272. *Id.* at 2498 (Kagan, J., dissenting).
273. Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2290 (2012); Harris v. Quinn, 134 S. Ct. 2618, 2627 (2014).
274. *Janus*, 138 S. Ct. at 2463.
275. *Id.* at 2463.

> In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, but in more recent cases we have recognized that this holding is "something of an anomaly," and that *Abood*'s "analysis is questionable on several grounds." We have therefore refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled.[276]

He sets the stage for *Abood's* reversal as if he is referring to long-standing precedent, rather than his own dicta. Thus, there seems to be an inherent bias in the Justice's reasoning as he ends the campaign to overrule *Abood*, a campaign his words started a few years ago.[277]

If the conservative majority used its own dicta to initiate the assault on *Abood*, what should stop it from using such a statement to overrule precedent in favor of conservative speech in the future? While this may be speculation, the recent trend of the Court certainly does not foreclose the argument, just as the dissent suggests.

B. Potential Implications of Janus *and the First Amendment*

Along with her issued warning at the end of her nearly fifteen-page dissent, Justice Kagan references that speech is everywhere, a part of every human activity, such as employment, health care, and securities trading, among other things.[278] As such, the conservative majority's use of the First Amendment seemingly has no end because all economic or regulatory policies that touch such speech are seemingly put in the cross hairs after the *Janus's* ruling.[279]

Consider the minimum wage for example. The federal minimum wage rests at $7.25 per hour as set by the Fair Labor Standards Act.[280] As the "fight for $15," currently continues across America, successful First Amendment challenges, backed by similarly-sponsored corporate-backed organizations, to a state's minimum wage laws may be forthcoming.[281] Indeed, such claims have already

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276. *Id.* (internal citations omitted).

277. *Id.* at 2498 (Kagan, J., dissenting) ("Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today.").

278. *Id.* at 2501-02.

279. *Id.*

280. 29 U.S.C. § 206 (2012, Supp. I, Supp. II, Supp. III, Supp. IV & Supp. V).

281. *See generally* Braden Campbell, *Wages up $61.5B for 19M Through Fight for $15, Report Says*, LAW360 (Nov. 30, 2016), https://www.law360.com/articles/867320/wages-up-61-

made their way to the courtroom but to no avail at this point.[282] The laws were viewed as purely economic regulations with the only impingement upon one's First Amendment rights being insufficient to trigger scrutiny.[283]

However, the minimum wage is another energetic policy debate.[284] While federal law sets the baseline, each state is free to enact a higher rate. Further, cities may enact local ordinances raising the minimum wage above the federal limit.[285] Nonetheless, employers are ultimately able to set the hourly wages for their employees greater than or equal to this set minimum wage. Generally, employers set these wages according to an employee's value, or what that employee's labor is "worth." However, what exactly one's labor is worth or how that worth is to be determined is one issue at the core of the minimum wage debate.[286] Thus, where a state or local ordinance has enacted a drastic increase to the minimum wage, most employers will be required by law to pay their employees more than they generally view their work to be worth.

Accordingly, in line with the *Janus* majority, such a drastic increase may be argued as compelling employers to overvalue the work of their employee's labor. This is especially true in light of the heated policy debate. If a similar argument is accepted, it may be enough to thrust a minimum wage law from being generally seen as a purely economic regulation, to being seen as implicating one's First Amendment rights to the point of triggering some level of scrutiny. As Justice Kagan's dissent makes clear, such a challenge is not out of the purview of the conservative majority.[287]

5b-for-19m-through-fight-for-15-report-says (describing the worker advocacy campaign, comprised of a majority of fast-food restaurant chain employees, to increase the minimum wage for workers).

282. *See* Int'l Franchise Ass'n, Inc. v. City of Seattle, 97 F. Supp. 3d 1256 (W.D. Wash. 2015), *aff'd in relevant part*, 803 F.3d 389 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1838 (2016).

283. *See Int'l Franchise Ass'n, Inc.*, 803 F.3d at 408.

284. *See generally* Alison Doyle, *Pros and Cons of Raising the Minimum Wage*, BALANCE CAREERS, https://www.thebalancecareers.com/pros-and-cons-of-raising-the-minimum-wage-2062521 (last updated July 15, 2019).

285. Erica Bergmann, Note, *Three out of Four Economists Recommend Raising the Minimum Wage! A Closer Look at the Debate Surrounding Seattle's Minimum Wage Ordinance*, 39 SEATTLE U. L. REV. 593, 594.

286. *See generally* Jenn Brown, *Trying to Understand the Value of Work: Why Do We Pay So Little for Labor that We Depend on So Much?*, NOTEWORTHY—THE J. BLOG (May 30, 2019), https://blog.usejournal.com/trying-to-understand-the-value-of-work-why-do-we-pay-so-little-for-labor-that-we-depend-on-so-9b760a53d33d.

287. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501-02 (2018) (Kagan, J., dissenting).

IV. CONCLUSION

In short, it is no secret that the liberal-conservative divide over free speech has intensified over the past few decades. This divide is significantly present on the conservative side of the Court, as recent case law evidences the conservative majority's use of the First Amendment as an outcome-oriented tool to achieve a certain agenda. It is this use of free speech principles that makes Justice Kagan's dissenting remarks correct, that truly today's Court has gone further than its predecessors and effectively weaponized the First Amendment. While its fate is still fairly unknown, there is certainly some truth behind Justice Kagan's warning that the conservative majority's road runs long. Indeed, the First Amendment was meant for better things.